**KHOO SOO TEONG**

**v.**

**KHOO SIEW GHIM & ANOR.**

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
HARUN HASHIM SCJ
[SC CIVIL APPEAL NO. 02-137-1991]
5 AUGUST 1991

***CIVIL PROCEDURE:*** *Whether needs to be included in writ, statement of claim, counterclaim or third party notice - Jurisdiction - Discretion - Misdirection by Judge in not reading indorsement in statement of claim - 'The Siskina' distinguished - Rules of the High Court 1980, O. 29 r. 1(1).*

The appellant father was the chairman of a family company and the daughters were the respondents who were also shareholders of the company. An extraordinary general meeting (EGM) was held on 28 February 1989 wherein it was resolved by the father, wife and son that each ordinary shareholder would be offered a rights issue of 99 ordinary shares with a nominal value of RM99 for each ordinary share registered in the name of the shareholder. It was also resolved that the offer of rights issue must be accepted and fully paid for not later than 15 March 1989 and if not accepted those rights issue shares would be dealt with as the directors deemed fit. The respondents were not informed of the EGM nor of the resolutions.

By a letter dated 30 August 1990, the 1st respondent's solicitors questioned the rights issue of the family company and requested an explanation failing which her solicitors threatened to take appropriate legal action to obtain a declaration that the rights issue shares were invalid.

On 27 September 1990, the father took out a writ against the daughters claiming *inter alia* for a declaration that the respective respondents held the shares originally allotted as nominees of the father.

On 5 October 1990 the appellant applied and obtained an interlocutory injunction to restrain the respondents from exercising their rights as shareholders. The respondents successfully set aside the injunction on 23 January 1991. On 22 February 1991, the learned Judge issued a certificate of no further argument under O. 56 r. 2(2) of the Rules of the High Court (RHC) 1980.

The learned Judge in dissolving the injunction decided that an applicant for an injunction must have a cause of action in law to entitle him to a substantive relief, and went on to hold that since an injunction is not a cause of action but a remedy, the injunction dated 5 October 1990 was invalid because it had been obtained without a substantive relief as grounded upon a cause of action in the writ. This is the father's appeal against the latter part of the decision.

**Held:**

**[1]** Under O. 29 r. 1(1) of the RHC 1980 an application for injunction may be made by a party to a cause or matter at any stage of the proceedings, whether or not a claim for the injunction is included in that party's writ and statement of claim or counterclaim or third party notice.

**[2]** The *Siskina* can be distinguished in light of the differing provisions in the English Rules of the Supreme Court and the fact that unlike the present case, there was no valid cause of action there. The trial Judge's conclusion that an applicant for an injunction must have a cause of action in law to entitle him to a substantive relief is a correct statement of law.

However the necessity of a substantive relief as a prerequisite is only partially correct. The misdirection resulted from the learned Judge reading only the endorsement in the writ and not the statement of claim.

**[3]** As it was clearly stated in the respondents' affidavit that there could not be any loss or irreparable damage to the appellant as the shares of the respondents could not be transferred without the approval of the board of directors and further that the respondents indicated that they had grounds to institute proceedings against the company and the directors under the Companies Act and to enforce their legitimate rights as shareholders of the company, the interlocutory injunction should be dissolved.

*[Interlocutory injunction dissolved and appeal dismissed.]*

[**Bahasa Malaysia** Translation of Headnote]

***PROSEDUR SIVIL:*** *Sama ada perlu disertakan dalam writ, penyata tuntutan, tuntutan balas atau notis pihak ketiga - Bidangkuasa - Budibicara - Salah arahan oleh Hakim kerana tidak membaca indorsmen dalam penyata tuntutan - Membezakan 'The Siskina' - Kaeadah-kaedah Mahkamah Tinggi 1980, Aturan 29, Kaedah 1(1).*

Pihak merayu (bapa) merupakan pengerusi sebuah syarikat dan anak-anak perempuannya adalah pihak responden yang juga merupakan pemegang-pemegang syer syarikat tersebut. Suatu mesyuarat umum luarbiasa (EGM) telah diadakan pada 28 Februari 1989 di mana telah diputuskan oleh bapa, isteri dan anak lelaki bahawa setiap pemegang syer biasa akan ditawarkan satu pengeluaran hakmilik (rights issue) sebanyak 99 syer biasa dengan harga nominal $99 bagi setiap syer biasa yang didaftarkan dalam nama pemegang syer.

Telah juga diputuskan bahawa tawaran pengeluaran hakmilik mesti diterima dan selesai dibayar tidak lewat dari 15 Mac 1989 dan jikalau tidak diterima, pengeluaran hakmilik syer tersebut akan diuruskan sebagaimana yang dianggap sesuai oleh pengarah. Pihak responden tidak diberitahu tentang EGM tersebut ataupun tentang resolusi-resolusi yang berkenaan.

Melalui surat bertarikh 30 Ogos 1990, peguamcara pihak responden pertama menyoal pengeluaran hakmilik syarikat keluarga dan memohon penjelasan; sekiranya penjelasan tidak diterima, mereka akan mengambil tindakan undang-undang yang sesuai untuk memperolehi deklarasi bahawa keluaran hakmilik tersebut tidak sah.

Pada 27 September 1990, pihak perayu telah mengeluarkan writ terhadap pihak responden dan menuntut, antara lain, suatu deklarasi bahawa pihak responden memegang syer yang pada asalnya diperuntukkan sebagai namaan (nominee) pihak merayu.

Pada 5 Oktober 1990, pihak merayu telah memperolehi injunksi sambilan yang menghalang pihak responden dari melaksanakan hak mereka sebagai pemegang syer. Pihak responden berjaya mengenepikan injunksi tersebut pada 23 Januari 1991 dan pada 22 Februari 1991, Hakim yang arif telah mengeluarkan suatu perakuan tidak ada pertikaian lanjut di bawah Aturan 56 Kaedah 2(2) Kaedah-kaedah Mahkamah Tinggi 1980 (KMT).

Apabila beliau membatalkan injunksi tersebut, Hakim yang arif telah memutuskan bahawa pemohon injunksi mesti mempunyai tindakan kausa dalam undang-undang yang akan membolehkannya memperolehi relif substantif, dan seterusnya, Hakim yang arif berkata bahawa oleh kerana injunksi bukan satu kausa tindakan tetapi hanya satu remedi, injunksi yang bertarikh 5 Oktober 1990 adalah tidak sah kerana diperoleh tanpa relif substantif seperti yang berdasarkan kausa tindakan dalam writ. Ini adalah rayuan pihak perayu terhadap bahagian terkemudian keputusan Hakim tersebut.

**Diputuskan:**

**[1]** Di bawah Aturan 29 Kaedah (1) KMT, permohonan untuk injunksi boleh dibuat oleh sesuatu pihak yang terlibat dalam kausa atau hal pada mana-mana peringkat prosiding sama ada tuntutan untuk injunksi disertakan dalam writ dan penyata tuntutan, atau tuntutan balas atau notis pihak ketiga.

**[2]** Kes 'its' boleh dibezakan berdasarkan peruntukkan yang berlainan dalam Peraturan-peraturan Mahkamah Agung Inggeris dan juga kerana tidak seperti kes ini, tidak wujudnya kausa tindakan yang sah di kes 'its'. Keputusan Hakim yang arif mengenai keperluan seorang pemohon injunksi mempunyai tindakan kausa yang boleh mendapatkannya relif substantif adalah suatu pernyataan undang-undang yang betul. Bahagian kedua keputusan tersebut manakalanya hanya separuh betul dan arahan salah beliau adalah disebabkan oleh kerana Hakim yang arif hanya membaca indorsmen dalam writ dan bukan dalam penyata tuntutan.

**[3]** Adalah jelas daripada kenyataan pihak responden bahawa pihak perayu tidak akan mengalami sebarang kerugian atau kerosakan yang tidak boleh dibaiki oleh sebab syer-syer responden tidak boleh dipindah hakmilik tanpa persetujuan lembaga pengarah. Selanjutnya, pihak responden menunjukkan bahawa mereka ada alasan untuk memulakan prosiding terhadap syarikat dan pengarah-pengrah tersebut di bawah Akta Syarikat 1965 untuk menguatkuasakan hak mereka yang sah sebagai pemegang-pemegang syer syarikat. Memandangkan keadaan tersebut, keputusan Hakim untuk membatalkan injunksi sementara merupakan keputusan yang betul.

*[Injunksi sambilan dibatalkan dan rayuan ditolak.]*

**Cases referred to:**

*Colebourne v. Colebourne [1876] 1 Ch. D 690* ***(cit)***

*Owners of cargo lately laden on board the vessel Siskina & Ors. v. Distos Compania Naviera SA [1977] 3 All ER 803* ***(dist)***

**Legislation referred to:**

Rules of the High Court 1980, O. 29 r. 1(1), O. 56 r. 2(2)
Rules of the Supreme Court [UK], O. 11 rr. 1(1)(a)-(o), 2
Specific Relief Act 1950, Chapter IX

**Other source referred to:**

*Halsbury's Law of England* 4th Edn., Vol. 24

*For the appellant - Gan Teik Chee; M/s. Gan Teik Chee & Ho*
*For the respondents - Tan Phock Kin; M/s. Thillaimuthu & Phock Kin*

**JUDGMENT**

**Hashim Yeop Sani CJ (Malaya):**

This was an appeal arising out of a dispute between members of a family over the control of Khoo Soo Teong Sdn. Bhd. (the family company). The appellant was the chairman and managing director of the family company and the respondents are his daughters. The family company was incorporated on 12 May 1981 and as on 14 October 1981 the allotment of shares in the family company was as follows:

| | |
|---|---|
| Khoo Soo Teong (the appellant) | 125 shares |
| See Swee Kan (appellant's wife) | 125 shares |
| Khoo Kay Thuan (appellant's son) | 250 shares |
| Khoo Siew Im (appellant's daughter) | 1,000 shares |
| Khoo Siew Ghim (appellant's daughter) | 1,000 shares |

The relationship between the father and the daughters must probably have soured during the late 1980s culminating in the extraordinary general meeting of the family company held on 28 February 1989. At that meeting it was resolved by the shareholders present (meaning the father, the wife and the son) that each ordinary shareholder would be offered a rights issue of 99 ordinary shares with a nominal value of RM99 for each ordinary share registered in the name of a shareholder. At this same meeting it was also resolved that the offer of the rights issue must be accepted and fully paid for not later than 15 March 1989 and if not accepted, those rights issue shares would be dealt with as the directors deem fit. The daughters (respondents) were not informed of this extraordinary general meeting nor the resolutions and the grounds given for not informing them was that their addresses were not known to the directors. According to the first respondent however no correspondence relating to the family company was in fact ever sent to her since 1986 although her address was known to the appellant.

By a letter dated 30 August 1980 the first respondent through her solicitors questioned the rights issue of the family company and asked for an explanation failing which she would instruct her solicitors to take appropriate legal action to obtain a declaration that the rights issue shares were invalid. On 27 September 1990 a writ was taken out by the father against the daughters claiming *inter alia* for a declaration that the respective respondents held the shares originally allotted as nominees for the father.

On 5 October 1990 the appellant came before the learned Judge in an *ex parte* summons in chambers for an interlocutory injunction to restrain the respondents from exercising their rights as shareholders. The learned Judge granted the interlocutory injunction. The application to set aside the injunction was heard by the learned Judge on 23 January 1991 and the learned Judge dissolved the injunction. On 22 February 1991 the learned Judge issued a certificate of no further argument under O. 56 r. 2(2) of the Rules of the High Court. Thus the appeal before this Court.

After hearing arguments in the appeal we dismissed the appeal.

We agreed that on the facts of this case the interlocutory injunction was correctly dissolved. However as conceded by Encik Gan, Counsel for the appellant, only one issue had to be clarified and this arose from the written judgment of the learned Judge. The written judgment was in Bahasa Malaysia and the relevant paragraph reads as follows:

> Pemohon yang ingin mendapat perintah injunksi mestilah mempunyai satu kausa tuntutan undang-undang yang membolehkan beliau mendapat satu substantif relief (the applicant must have a cause of action in law to entitle him to substantive relief (The *Siskina* [1979] AC 210)). Maka oleh kerana injunksi bukanlah satu kausa tuntutan, tetapi satu remedi, perintah injunksi 5 Oktober adalah tidak sah oleh kerana ia telah diperolehi tanpa satu substantif relief yang berasaskan kausa tuntutan di dalam writ.

The translation in English of the above cited paragraph of the judgment as provided by the appellant and not disputed by the respondents reads as follows:

> An applicant for an injunction must have a cause of action in law to entitle him to a substantive relief (*The Siskina* [1979] AC 210). Therefore, since an injunction is not a cause of action but a remedy, the injunction dated 5 October is invalid because it had been obtained without a substantive relief as grounded upon a cause of action in the writ.

The first sentence of the paragraph which states that an applicant for an injunction must have a cause of action in law to entitle him to a substantive relief is a correct statement of law. The second sentence however is only partially correct. The misdirection was as a result of the learned Judge reading only the endorsement in the writ and not the statement of claim.

Under our law the jurisdiction to grant injunction is expressed in Chapter IX of the Specific Relief Act 1950 (on the law of injunctions generally) which states that preventive relief may be granted at the discretion of the Court by injunction. The injunction may be temporary or perpetual. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

Under O. 29 r. 1(1) of the Rules of the High Court 1980:

> An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, **whether or not a claim for the injunction was included in that party's writ,** originating summons, counterclaim or third party notice, as the case may be. (Emphasis supplied)

Thus under our law an application for injunction may be made by any party to a cause or matter at any stage of the proceeding, whether or not a claim for the injunction is included in that party's writ and statement of claim or counterclaim or third party notice, as the case may be. See also *Halsbury's Law of England* 4th Edn., Vol. 24, para. 1048. *Colebourne v. Colebourne* [1876] 1 Ch. D 690 which required that the plaintiff before applying for interim injunction should endorse his writ to include the prayer for injunction is not good authority in our law.

Coming to the case cited by the learned Judge; *Owners of cargo lately laden on board the vessel Siskina & Ors. v. Distos Compania Naviera SA.* (*The Siskina*) [1977] 3 All ER 803 it is to be noted that the real issue there was the interpretation of O. 11 r. 1(1) of the English Rules of the Supreme Court. At stake in that case was the insurance moneys which were payable in England to the shipowners' brokers. The first step in the proceedings was an application by the cargo owners *ex parte* to the Judge of the Commercial Court in London for leave to issue a writ against the shipowners and to serve notice of it out of jurisdiction and for an immediate interim injunction to restrain the shipowners from disposing of their assets within the jurisdiction of the High Court including the insurance proceeds in respect of the loss of the vessel.

On an *ex parte* application to Mocatta J the learned Judge gave leave for service on the shipowners out of jurisdiction and granted a Mareva injunction against them. The matter came before Kerr J on an application by the shipowners to set aside the service of notice of the writ and all subsequent proceedings. Kerr J granted the application but also gave the cargo owners leave to appeal to the Court of Appeal. On appeal the Court of Appeal by a majority (Lord Denning MR and Lawton LJ, Bridge LJ dissenting) reversed the judgment of Kerr J and restored the Mareva injunction as originally granted by Mocatta J. The appeal then went before the House of Lords.

Order 11 of the English Rules of the Supreme Court permits the High Court in England to grant leave to a plaintiff to serve its process on a person outside the territorial limits of England and Wales in those cases, but only in those cases, that are specified in sub-paras. (a) to (o) of r. 1(1) or in r. 2. Accordingly it is not permissible in any action commenced by service of process on a person out of the jurisdiction to litigate any claim that does not fall within one or other of the said subparas. (a) to (o). Thus the House of Lords allowed the appeal and restored the judgment of Kerr J which set aside the writ and all subsequent proceedings.

The other thing to be noted is that unlike our present case there was no valid cause of action in *The Siskina.* The cargo owners had no legal or equitable right or interest in the insurance moneys payable to the shipowners in respect of the loss of the vessel. All that they had was a claim to monetary compensation arising from a cause of action against the shipowners which is not justiciable in the High Court in England without the shipowners' consent - which they had withheld.

We may also mention that the application by the appellant in the present case for the interlocutory injunction was grounded exclusively on paras. 15 and 16 of the supporting affidavit the translation of which reads as follows:

> 15. By her solicitors letter dated 30 August 1990, the 1st defendant questioned the said rights issue. A copy of the said letter is shown to me and annexed to this affidavit marked "KST3". I gather from the said letter that the defendants will attempt to exercise their rights as registered shareholders to obtain a declaration on technical grounds that the said rights issue is invalid before the determination of the suit herein.
>
> 16. In the premises, I would suffer irreparable damage, that is, the loss of 173,625 ordinary shares (12,375 + 61,500 + 99750 ordinary shares), if the defendants are not restrained by injunction from acting as stated in para. 15. Moreover, I would become a minority shareholder in the List of Registered Shareholders of the said company.

In the affidavit-in-support to dissolve the injunction it was stated clearly that there could not be any loss or irreparable damage to the appellant as the shares of the respondents could not be transferred without the approval of the board of directors. It was also revealed in the same affidavit that the respondents had been advised that they had grounds to institute proceedings against the company and the directors under the Companies Act and to enforce their legitimate rights as shareholders of the company.

We agreed with the learned Judge that under the circumstances the interlocutory injunction should be dissolved and dismissed the appeal but made no order as to costs. Deposit to be refunded.

Also found at [1991] 3 CLJ 2063